In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1051

CULLEN HUCKABY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted and sentenced on four counts charging unlawful possession of a still, the possession and fermentation of mash, unlawful possession of distilled spirits, and working in an unregistered distillery. While his appeal was pending, he filed in the district court a motion for a new trial on the ground of newly discovered evidence. Following a hearing, the district judge denied the motion, finding

the testimony concerning alleged wiretapping "fantastic". The court of appeals thereafter entered orders affirming both the conviction and the denial of the motion for a new trial, 400 F. 2d 576. Petitions for writs of certiorari were denied by this court, 393 U.S. 933, 938.

In the instant proceeding for post-conviction relief, petitioner claimed that the government had knowingly suppressed evidence favorable to him in that a co-defendant who pleaded guilty allegedly had told government agents that petitioner "had nothing to do with the still." The district court denied the motion, and the court of appeals affirmed. These rulings were fully justified and do not warrant further review. Unlike *Giles* v. *Maryland*, 386 U.S. 66, on which petitioner relies, the allegedly suppressed information did not relate to any evidence produced at trial, since the co-defendant did not testify. The alleged statement of the co-defendant was not admissible evidence for or against petitioner. Cf. *Brady* v. *Maryland*, 373 U.S. 83 (unconstitutional suppression of a co-defendant's confession which would have been inadmissible at trial on the question of the petitioner's guilt did not require a new trial.)

In addition, the circumstances of this case cannot support any inference of prejudice to petitioner, who was of course well aware before trial of his co-defendant's existence. Petitioner knew whether he himself was guilty of the charges and knew, if his co-defendant were to testify, truthfully, at trial, what that testimony would be. If petitioner in fact believed that the co-defendant would give truthful tes-

timony exculpating him, the government's failure to come forward and advise petitioner of the co-defendant's alleged statements could not have affected the petitioner's incentive to secure the co-defendant's testimony. If petitioner in fact knew that the co-defendant's testimony would incriminate him, the government's failure to disclose the co-defendant's apparently untruthful statement deprived petitioner of no legitimate interest.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1970.

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